NO. 91-1181

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HERMAN COLEMAN, JR.

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. When the prosecutor in a drug case strikes all three black veniremen, and the cursory voir dire of the last black venireman shows only that the venireman knew someone who was charged with an unrelated drug crime, but that that venireman did not know the details of that unrelated offense, did not know the defendant, did not know the details of the defendant's crime, and denied any bias or partiality, is the prosecutor's reliance on that venireman's awareness of the unrelated defendant's charges sufficient to rebut the prima facie case of discrimination?

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257, in that Petitioner alleges that he was convicted of a crime in violation of the rights guaranteed him under the Sixth and Fourteenth Amendments to the United States Constitution. He is seeking review of the decision of the Virginia Supreme Court dated September 20, 1991, denying his Petition for Appeal. The only appellate decision reflecting a consideration of Petitioner's claim on the merits is the opinion of the Court of Appeals of Virginia dated November 15, 1990, a copy of which is reproduced in pertinent part in the Appendix.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

U.S. CONST. AMEND. VI.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> 1. ... No State shall make or enforce any law which shall bridge the privileges or immunities of citizens of the United States; nor shall any State... deny to any

person within its jurisdiction the equal protection of the laws.

U.S. CONST. AMEND. XIV.

STATEMENT OF THE CASE

Herman Coleman, Jr., Petitioner, was indicted in July, 1989, in Orange County, Virginia, on a charge of being a principal in the second degree to cocaine distribution. Coleman pled not guilty. He was tried on September 21, 1989, by a jury.[1]

Three blacks were on the venire panel-- Maggie Collins, Mary Carter Hughes, and Welford Courtney. Maggie Collins was struck for cause, without objection. Ms. Hughes stated on voir dire that she knew the defendant, though she did not believe that it would affect her ability to be impartial. The Commonwealth struck her, using a peremptory strike, the defense agreeing that the Commonwealth had an acceptable independent basis for doing so. The Commonwealth also struck Welford Courtney, who had stated on voir dire that he knew a James Hughes, who was also under indictment in Orange County for drug charges. Mr. Courtney stated that he had not discussed Mr. Hughes' case with him, that he had not received any information about Mr. Hughes' case from any members of his family, that he knew nothing about how

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[1] Under Virginia procedure, the venire is examined until twenty are found to be free from challenge for cause. From this panel, both prosecution and defense receive four peremptory challenges. The Commonwealth makes the first peremptory strike, the defendant the next, and so on until each side has struck four veniremen.

the cases had been handled that would lead to any bias against the government, and that he would be able to base his decision in Herman Coleman's case solely upon the law and the evidence.

After peremptory strikes were taken, but before the jury panel was sworn, defense counsel objected to the peremptory strike of juror Welford Courtney. The Commonwealth, conceding a prima facie case under Batson v. Kentucky, gave the following justification:

> Your Honor, the Court will recall that Mr. Courtney indicated in his responses that he was a personal friend of James Gordon Hughes, who was Mrs. Hughes' nephew. Mr. Hughes has, I believe, either two or three cocaine distribution charges pending in the General District Court of Orange County, which in the Commonwealth's view, hope will be certified to this Court. We don't know what information Mr. Courtney may have received from Mr. Hughes regarding those matters. The Court will also recall that Mr. Hughes was the subject of a direct indictment arising out of the very same investigation, which Special Agent W.H. Taylor was the main person involved in, and that there was some question about identification and that-- which led to the indictment being dismissed upon Commonwealth's motion. We submit that if Mr. Courtney had any information regarding this, that may affect his judgment in this case, and it was for that basis that the Commonwealth felt that there was-- Mr. Courtney posed more of a risk than most of the other jurors who were left. And as far as the Commonwealth was concerned, to-- in weighing

> this evidence fairly, and he was struck on that basis, and not because he happened to be black.

Transcript at 110-111.

The trial judge, the Honorable Lloyd C. Sullenberger, stated as follows:

> ... The Court rules that it finds no impermissible racial basis for striking Welford Courtney. The Court also rules that it will accept the Commonwealth's proffer.... Will accept the Commonwealth's proffer that there are pending charges against Mr. Hughes. And that is certainly basis for exercise of peremptory strike [sic]. It's got to be remembered, and I'm sure it is remembered by counsel, that there is a great deal more leeway in peremptory strikes than the basis for strikes for cause, but we find no impermissible motive.

Transcript at 112-113.

The jury found the Defendant guilty of distribution of cocaine, and recommended a sentence of 20 years in prison and a $20,000 fine.

Following the discharge of the jury, the Defendant moved the Court to set aside the verdict as being contrary to the law and the evidence; the Court overruled the motion and set sentencing for November 30, 1989. On that date, before sentencing, Defendant argued his motion for a new trial, which had been filed in writing after the trial. That motion cited as one reason for a new trial the improper strike of venireman Welford Courtney.

After a sentencing hearing on November 30, 1990, the trial judge made the following comment:

> The Court understands its responsibility in connection with the jury verdict. It has a heavy responsibility. The verdict here, the period of incarceration falls approximately in the middle of the range of sentences fixed by the General Assembly, the range being five (5) to forty (40) years. Not the arithmetical middle, but very close. The Court is unable to say that the sentence is a product of improper passion or anything such as that. It is the view of a jury of citizens of this county considering the appropriate punishment for a drug transaction, and the Court does not feel-- and of course, recognizes it does not have to find the sentence a product of passion to alter it, but makes that comment. Finds nothing improper about it as far as the period of incarceration is concerned.

Transcript of November 30, 1989, at 76. The Court then imposed the jury's recommended sentence of twenty years, but suspended the fine of $20,000.

The Defendant noted his appeal in a timely fashion to the Court of Appeals of Virginia, which denied his petition for appeal in an unpublished opinion dated November 15, 1990 (printed in the Appendix hereto). The Defendant then appealed the case to the Supreme Court of Virginia. The Supreme Court of Virginia denied the Petition for Appeal by Order dated May 31, 1991, and denied a subsequent Petition for Rehearing by Order dated September 20, 1991. A timely motion to stay the issuance of the mandate was filed.

STATEMENT OF FACTS

From January, 1989 to July, 1989, Special Agent W.H. Taylor of the Virginia State Police was working undercover in the town of Orange in Orange County, Virginia, investigating the sale and distribution of cocaine.

At approximately 10:15 p.m. on March 9, 1989, Agent Taylor was driving on Church Street in the town of Orange when he observed a vehicle which he knew was being driven by Herman Coleman. Taylor "flashed, or flickered" (Tr. 130) his headlights "to get his attention as he (the defendant) approached me." When the two vehicles were side by side, both Taylor and Coleman stopped in the road. Taylor testified that he told Coleman that "I wanted to purchase a quantity of cocaine." Tr. 148. Taylor testified that Coleman, who was alone, suggested to him that he wait on a nearby street. A minute or two later, Coleman drove onto the street where Taylor was waiting, this time accompanied by a Robert Williams. Williams got out of the car, came to Taylor's window and handed Taylor a quantity of what turned out to be 0.127 grams of crack cocaine.

Taylor testified that he "complained to Mr. Williams about its size; it was somewhat less than what I was accustomed to receiving for the amount of $50.00. I asked Mr. Williams if he would receive $40.00. Mr. Williams stated to me, 'He said $50.'" Tr. 133. Taylor testified that Williams never mentioned who "he" was, and did not point or gesture or in any other way indicate who "he" was. Tr. 175.

Taylor then gave Williams $40.00, keeping the cocaine. He suggested to Williams that Williams find out if $40.00 would be acceptable. Williams then returned to

Coleman's car, a brief conversation followed, and then Williams returned to tell Taylor that $40.00 was acceptable. Tr. 133.

Williams then got back into Coleman's car, and Coleman began to leave. As the cars were side by side, Taylor yelled to Coleman, "Is that okay?" Taylor testified that Coleman "waved and nodded his head in an up-and-down motion." Tr. 134.

Agent Taylor also testified that during the course of his six-month investigation in Orange, he had never seen Coleman involved in drug activity, either before or after March 9, 1989; however, he had purchased cocaine twice before from Robert Williams, and Taylor agreed that he could not "vouch for the [trustworthiness] of the people who would sell" cocaine. Tr. 161.

The defense argued to the jury that the Commonwealth had proven only that Robert Williams had distributed cocaine, and that there was certainly a reasonable doubt about what Mr. Coleman's role, if any. had been.

SUMMARY OF ARGUMENT

This Court has in the last five years held that a state cannot exclude black veniremen from a jury panel simply because they are black. In Batson v. Kentucky, 476 U.S. 79 (1986), this Court held that prosecutors may not use peremptory challenges to exclude blacks from the jury trying a black defendant. In Griffith v. Kentucky, 479 U.S. 314 (1987), that decision was held to be retroactive. In Holland v. Illinois, 493 U.S. ___, 107 L.Ed.2d 905 (1990), the Court considered the application of Batson when the defendant was white.

However, this Court has never decided a case reviewing how the trial courts and state appellate courts are applying Batson.

State appellate courts differ on the degree of scrutiny imposed upon the prosecutor's attempts to articulate a "neutral explanation," and both trial courts and the state appellate courts need guidance from this Court on the standards that they must apply in deciding when a prosecutor has successfully rebutted a prima facie showing of race discrimination in jury selection.

In this particular case, there were three black veniremen. One was struck for cause, and the other two were struck peremptorily by the prosecution, leaving an all-white jury. The all-white jury, finding the defendant guilty as a principal in the second degree to a single count of distribution of a small amount of crack cocaine, sentenced the defendant to 20 years in prison and a $20,000 fine.

This Court should grant certiorari to use this case as a vehicle for emphasizing to trial courts and to state appellate courts that this Court meant what it said in Batson-- that racial discrimination in the exercise of peremptory challenges must be eliminated.

ARGUMENT

I. THE PROSECUTION FAILED TO REBUT THE PRIMA FACIE CASE OF RACIAL DISCRIMINATION IN THE PEREMPTORY CHALLENGE TO VENIREMAN WELFORD COURTNEY.

PUBLISHER'S NOTE

THE FOLLOWING PAGE IS UNAVAILABLE
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based on an impermissible group bias.[3] See also Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987), cert. denied, Jones v. Garrett, 484 U.S. 898 (1987) (prosecutor's failure on voir dire to focus on the characteristics he found troublesome regarding the black jurors struck from the panel was an important factor in court's holding that the prosecutor's proffered explanations "did not withstand scrutiny"); People v. Turner, 230 Cal. Rptr. 656 (Cal. 1986) (prosecutor's failure to engage in meaningful inquiry on voir dire supports inference that peremptory challenges were based on impermissible group bias); Slappy v. State, 503 So.2d 350, 355 (Fla. App. 3 Dist. 1987) ("no examination or only a perfunctory examination of the challenged juror" is a factor to be weighed in assessing the legitimacy of the prosecutor's peremptory strikes.) Based on the foregoing factors, Coleman satisfied the Batson standard for establishing a prima facie case of purposeful discrimination in the Commonwealth's selection of the petit jury.

A. The Commonwealth's alleged "neutral explanations" were insufficient to rebut appellant's prima facie showing of purposeful discrimination in the Commonwealth's selection of the petit jury.

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[3] Whether the prosecutor has engaged in a meaningful inquiry on voir dire is relevant, first, to establishing a prima facie case of purposeful discrimination, and, second, to assessing whether the prosecutor has articulated legitimate, neutral explanations sufficient to rebut the defendant's prima facie case of impermissible peremptory strikes. See Slappy v. State, 503 S.2d 350, 355 (Fla.App. 3 Dist. 1987), approved by 522 So.2d 18 (Fla. 1988), cert denied, 487 U.S. 1219 (1988).

Once Coleman established a prima facie case of purposeful discrimination, the burden shifted to the Commonwealth "to come forward with a neutral explanation for challenging black jurors." Batson, 476 U.S. at 97. The Commonwealth may not rebut the defendant's prima facie case by stating merely that it challenged jurors of defendant's race on the assumption that they would be partial to the defendant based upon their shared race.

> Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or affirming his good faith in making individual selections.

Id.

The Commonwealth's explanations must be "clear and reasonably specific"; the Commonwealth must articulate "legitimate reasons" for exercising its peremptory challenges and the reasons must "relate[] to the particular case to be tried." Batson, 476 U.S. at 98 & n.20. On this record, the Commonwealth's alleged "neutral explanations" for its peremptory strikes did not satisfy these constitutional requirements and failed to rebut Coleman's prima facie showing of purposeful discrimination in the Commonwealth's selection of the petit jury.

B. The trial court misconstrued the Batson standard and failed to satisfy its duty to determine on the record whether appellant had established purposeful discrimination in the Commonwealth's selection of the petit jury.

Once a defendant establishes a prima facie case and the prosecutor articulates "neutral explanations" for his peremptory challenges, the trial court then has "the duty to

determine if the defendant has established purposeful discrimination." Batson, 476 U.S. at 98 (footnote omitted). Here, even if we assume that the Commonwealth had articulated "neutral explanation[s] related to the particular case to be tried," Batson, 476 U.S. at 98, the trial court misconstrued the Batson inquiry and failed to satisfy its duty of determining whether the Commonwealth's explanations sufficiently rebutted the defendant's prima facie case.

Batson and its progeny requires the trial judge to assess the credibility of the prosecution's asserted justifications based on the totality of the circumstances, as reflected in the trial record. See Jackson v. Commonwealth, 8 Va. App. 176, 185, 380 S.E.2d 1,6 (1989), citing State v. Slappy, 522 So.2d 18, 22 (Fla. 1987). See also Gamble, 357 S.E.2d at 795 ("The explanation offered for striking each black juror must be evaluated in light of the explanations offered for the prosecutor's other peremptory strikes."). The trial judge must inquire into the legitimacy of the prosecutor's justifications, Stanley v. State, 542 A.2d 1267, 1281 (Md. 1988), cert. denied, 587 A.2d 247 (Md. 1991), and must evaluate each allegedly neutral explanation "as he would any disputed fact." Jackson, 8 Va. App. at 185, 380 S.E.2d at 6. The trial court record "must contain findings..., not just a conclusion, in order to facilitate the initial inquiry and appellate review." Id., citing Stanley, 542 A.2d at 1277. See also Chambers v. State, 724 S.W.2d 440 (Tex. 1987) (the trial record must contain specific findings of neutral reasons.)

One of the relevant factors in deciding a Batson challenge is whether the prosecutor engaged in meaningful voir dire designed to expose the prejudice that he later insists was the basis for his strike. A "prosecutor's failure to engage black prospective jurors in more than

desultory voir dire is a factor supporting an inference of group bias." Jackson, 8 Va. App. at 187, 380 S.E.2d at 7, citing People v. Turner, 230 Cal. Rptr. 656, 665 (Cal. 1986). See also Gamble v. State, 357 S.E.2d 792, 795-96 (Ga. 1987) (prosecutor's proffered explanations were suspect because, inter alia, the "prosecutor's voir dire examination of many of the black jurors was minimal"). Any legitimate doubts the Commonwealth had concerning Courtney's impartiality could have been resolved during voir dire, but Mr. Courtney's answers on voir dire left no doubt that he was just as likely as any other member of the venire to be impartial.

The trial court in Herman Coleman's case failed to properly apply the law articulated in Batson v. Kentucky.[4]

II. THIS COURT MUST CLARIFY SOME OF THE AREAS OF CONFUSION INVOLVING THE IMPLEMENTATION OF BATSON V. KENTUCKY.

Justice Marshall, in his concurrence in Batson, urged doing away entirely with peremptory challenges, noting that trial courts face a "difficult burden of assessing prosecutors' motives." 476 U.S. at 105.

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[4] This Court has never held that jury selection errors are subject to a harmless error analysis. However, the specter of prejudice may certainly be seen when an all-white jury returns a sentence of 20 years in jail and a $20,000 fine to someone who, for all they know, has no prior record and the evidence suggests only one sale of one $40 sample of crack cocaine-- 0.127 grams of cocaine. The jury returned exactly the sentence asked for by the Commonwealth. Tr. 209.

> Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons. How is the Court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant... or seemed "uncommunicative" ... or "never cracked a smile" and, therefore, "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case,"... ? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on non-racial grounds, then the protection erected by the Court today may be illusory.

476 U.S. at 106. This Court disagreed with Justice Marshall, stating that the Batson standard "is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race." 476 U.S. at 99, n.22. The Court placed its confidence in the prosecutors and the trial courts in requiring that

> the prosecutor... articulate a neutral explanation related to the particular case to be tried.

Id. at 98. (Emphasis added).

One commentator, the Honorable Theodore McMillian, Judge of the United States Court of Appeals for the Eighth Circuit, noted that Batson did not state to what extent the prosecutor's rebuttal explanation should be scrutinized.

> Ineffective scrutiny of prosecution explanations is the single greatest problem hindering the effective implementation of Batson. Just as Justice Marshall predicted in his concurring opinion in Batson, courts are having an extremely difficult time distinguishing between legitimate reasons for the use of peremptory challenges and mere excuses or pretexts for discrimination.

McMillian & Petrini, 58 U.M.K.C. L.Rev. 361, 369 (1990). Judge McMillian identified three particular types of suspicious prosecutorial explanation for the exercise of peremptory challenges which lower courts have accepted:[5]

- "The venireman may have a connection with the case being tried."

- "The excluded juror shared some non-racial characteristic with the defendant."

- "Peremptory strikes based upon the demeanor or attitude of the venireman."

58 U.M.K.C. L.Rev. at 370. In this case, at least the first two "suspicious explanations" may be involved.

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[5] This analysis, according to Judge McMillian, is based significantly on Note, "Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?," 74 Va. L.Rev. 811, 826-29 (1988).

Looking through state cases, it is apparent that many, if not most, state appellate courts are in conflict with Virginia's handling of this issue.[6]

Among the courts that have exercised far more scrutiny are the appellate courts of Alabama,[7] Florida,[8]

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[6] One of the Virginia Court of Appeals' other decisions-- Taitano v. Commonwealth, 4 Va.App. 342, 358 S.E.2d 590 (1987), is frequently cited (by Judge McMillian, among others) as another example of how appellate courts failed to scrutinize prosecutorial strikes. The Court of Appeals upheld striking blacks because they lived near the defendant, near the scene of the crime, or in high-crime areas. The Commonwealth's Attorney also considered the "age, dress, and demeanor of the prospective jurors." 4 Va.App. at 347. As Judge McMillian and others have argued, these are merely proxies for the veniremen's race.

[7] See ex parte Branch, 526 So.2d 609 (Alabama, 1987), setting forth standards to ensure the race-neutral selection of a jury; see also Madison v. State, 545 So.2d 94 (Ala. Cr.App. 1987); Williams v. State, 548 So.2d 501 (Ala.Cr.App. 1988). In Williams, the Court held that the Commonwealth could not strike a black juror who had simply "heard of" the defendant without further voir dire (or, presumably, evidence of impartiality coming from such voir dire).

[8] See State v. Slappy, 522 So.2d. 18 (Fla.), cert. denied ____ U.S. _____, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988); Mayes v. State, 550 So.2d 496 (Fla.App. 1989).

Georgia,[9] Maryland,[10] New Jersey,[11] New Mexico,[12] and Texas.[13]

This case affords this court a very useful opportunity to clarify the degree of scrutiny that trial courts must use when examining the prosecutor's asserted reasons for striking black jurors. Because the existence of a prima facie case is conceded, it is not necessary for the Court to consider the somewhat muddier contention that the strength of the prima facie case should affect the degree of scrutiny.[14]

Nor need this Court deal with the question of whether a prima facie has been made; the prosecutor conceded a prima facie case was made, and that concession is the law of the case.

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[9] See Gamble v. State, 257 Ga. 325, 327-28, 357 S.E.2d 792, 795 (1987).

[10] See Chew v. State, 562 A.2d 1270, 1276-77 (Md. 1989).

[11] See State v. Gilmore, 103 N.J. 508, 542-43, 511 A.2d 1150, 1168 (1986).

[12] See State v. Aragon, 109 N.M. 197, 784 P.2d 16 (1989).

[13] See Reich-Bacot v. State, 789 S.W.2d 401, 403-05 (Tex.App. 1990).

[14] See Gamble v. State, 257 Ga. at 327, 357 S.E.2d at 795.

In summary, this case would be an excellent occasion for the Court to provide guidance to lower courts on the narrow question of the degree of scrutiny to which the prosecutor's claims of non-racial motivations should be put.

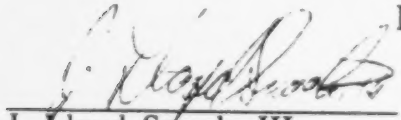
CONCLUSION

Petitioner Herman Coleman, Jr., prays this Court to grant certiorari, for two reasons:

- He was convicted and sentenced by an unfairly-constituted jury; and

- This Court needs to give guidance to the lower courts in deciding how lower courts should handle the prosecutor's claim of a race-neutral reason for exercising a peremptory challenge.

HERMAN COLEMAN, JR.
By Counsel



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Counsel for Petitioner

MAILING CERTIFICATE

I hereby certify that three copies of this Petition for Writ of Certiorari were mailed first-class, postage prepaid, to Timothy K. Sanner, Commonwealth's Attorney for the County of Orange, 112 Belleview Avenue, Orange, VA 22960, and that 40 copies of this Petition were mailed to the Clerk of this Court, first-class mail postage pre-paid, this 19th day of December, 1991.

J. Lloyd Snook, III

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 20th day of September, 1991

Herman Coleman, Jr. — Appellant

against — Record No. 910050
Court of Appeals No. 1990-89-2

Commonwealth of Virginia — Appellee

Upon a Petition for Rehearing

On consideration of a petition of the appellant to set aside the judgment rendered herein on the 31st day of May, 1991 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Keenan took no part in the consideration of this case.

A Copy,
Teste:

David B. Beach
Clerk

APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 31st day of May, 1991

Herman Coleman, Jr., Appellant

against Record No. 910050
Court of Appeals No. 1990-89-2

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

APPENDIX C

The decision (unpublished) of the Court of Appeals of Virginia (in pertinent part):

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 15th day of November, 1990

Herman Coleman, Jr., Appellant,

against

Record No. 1990-89-2
Circuit Court No. CF89-099

Commonwealth of Virginia, Appellee.

From the Circuit Court of Orange County

Before Judges Barrow, Cole and Retired Judge Murphey[15]

This petition for appeal is denied for the following reasons:

* * * *

The trial court did not violate the Batson rule. The Commonwealth explained that Courtney was stricken because upon voir dire it was revealed that he knew James Gordon Hughes, a person with cocaine distribution charges pending against him in Orange County General District Court. The Commonwealth's Attorney further explained

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[15] The Honorable D.W. Murphey took part in the consideration of this case by designation pursuant to Code § 17-116.01.

that he did not know what information Courtney may have received from Hughes regarding these matters. Hughes was the subject of a direct indictment arising out of an investigation in which Special Agent Taylor was the main officer involved. We conclude that the Commonwealth established a racially neutral explanation for removing Courtney from the panel and that there was no violation of Batson. See Taitano v. Commonwealth, 4 Va. App. 342, 358 S.E.2d 250 (1987).

* * * *

APPENDIX D

For the benefit of the Court, we attach here copies of relevant sections of the trial transcript:

From the voir dire:

The Court: ... Are any of you related by blood or by marriage to the accused, Herman Coleman, Jr.? If no, say no; if yes, say yes and raise your hand.

(All jurors respond, "No.")

The Court: All right, thank you, ladies and gentlemen. Are any of your [sic] now or have you in the past been agents or employees of Mr. Coleman?

(All jurors respond, "No.")

The Court: Do any of your [sic] have any special interest in this trial or the outcome of this case?

(All jurors respond, "No.")

The Court: Have any of you acquired any information about the alleged offense or the accused, Herman Coleman, Jr., from the news media or any other source, and if you have, would that information affect your impartiality in the case?

(All jurors respond, "No.")

The Court: All right, thank you. Have any of you expressed or formed any opinion as to the guilt or innocence of the accused, Herman Coleman, Jr.?

(All jurors respond, "No.")

The Court: Are you sensible of any bias or prejudice for or against the Commonwealth of Virginia which is the prosecution in a felony case, or the accused, Mr. Coleman?
(All jurors respond, "No.")

The Court: Thank you. Do you understand that the defendant is presumed to be innocent?

(All jurors respond, "Yes.")

The Court: Do you understand that the defendant is not required to produce evidence?

(All jurors respond, "Yes.")

The Court: Do you know of any reason whatsoever why you cannot give a fair and impartial trial to the Commonwealth and to the accused, based solely on the evidence which you hear in the courtroom and the law which I give you as the Judge?

(All jurors, except Ms. Hughes and Ms. Collins, respond, "No.")

Transcript pp. 72-73.

* * * *

From the voir dire by the Commonwealth's Attorney:

Mr. Sanner: ... Is there any juror here-- I think the Court may have covered this in some of the last questions arising out of the answers that Ms. Hughes made-- is there any other juror who personally knows Herman Coleman, the defendant?

(No response.)

Transcript pp. 76-77.

* * * *

From individual voir dire:

Mr. Sanner: ... Do any of you have a relative or a close personal friend who has been arrested within the last year by any Orange County agency on any type of drug offense? ...

Ms. Hughes: My nephew, James Hughes.

* * * *

Mr. Sanner: All right, Mr. Courtney, I believe?

Mr. Courtney: Yes.

Mr. Sanner: All right, Mr. Courtney, who was the individual that was --

Mr. Courtney: Her nephew.

Mr. Sanner: Mr. Hughes?

Mr. Courtney: Yes.

Mr. Sanner: Okay. All right, have you discussed Mr. Hughes' case with him?

Mr. Courtney: No.

Mr. Sanner: All right, have you received any information about that from any members of the family?

Mr. Courtney: No.

Mr. Sanner: All right, is there anything that you know about how that case has been handled to this point that would lead you to any type of bias against the Commonwealth?

Mr. Courtney: No.

Mr. Sanner: Do you feel that you'd be able to base your decision today solely upon the law and the evidence that's presented?

Mr. Courtney: Yes.

Mr. Sanner: All right, thank you, Mr. Courtney. That's all the questions I have, Your Honor.

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Transcript, pp. 79-81.

APPENDIX E

Defense counsel's objections to the Commonealth's improper peremptory challenges:

Mr. Heilberg. ... Secondly, and this is just for the record, I'm going to proffer what happened here in the courtroom during the peremptory strikes. There were originally-- on the original panel of 20, there were three black jurors, to my observation: Ms. Collins, Ms. Hughes and Mr. Hawkins-- I'm sorry, Mr. Courtney, Welford Courtney, thank you. Those were the three black jurors. One was struck for cause, that doesn't matter. There were two left on the panel. Certainly, I can see an independent basis for the Commonwealth striking Ms. Hughes, and that certainly there's an independent basis on the record for that strike. I don't know what the independent basis for striking Mr. Courtney is, I just point out for the record that the Commonwealth struck the only two black jurors left on the panel. I know that the Court is familiar with the latest Supreme Court authority on that. There has to be a pattern of things, there's a lot of-- there's a lot of recent case law on that and of course, we don't know that it still happens in court as to whether that case law applies; we'd have to look at the cases.

But I do point that out for the record, to say that for the record, Your Honor. Also should state for the record because it's something, if you don't say it, and you can't tell it from a transcript, but that the witness in chief for the Commonwealth is an undercover special agent who himself is black. And, of course, the defendant is black. These are just matters that need to be vouched on the record.

The Court: Go ahead, sir, that's fine. You're welcome to put those in the record. All right, the black-- appearing to the Court, of course, this is always a problem, but we will-- we don't ask the race of the jurors or perspective [sic] jurors, but we'll assume for purpose of this hearing that of the final panel of 20, the only two black prospective jurors were stricken by the Commonwealth. The defense counsel concedes we cannot complain about the peremptory strike to Mary Carter Hughes. Does the Commonwealth concede there's a prima facie case for purpose of argument here today?

Mr. Sanner: Your Honor, I think the safest thing for the Commonwealth to do would be to concede that there is. I think it's kind of hard to make a pattern of one, but I would like to put our reasons in the record.

The Court: All right, well, the-- that's the way the Court prefers to do it unless there's some major argument. Ordinarily if all or any blacks are stricken and defense counsel wants to raise it, why we assume the prima facie case, so we move the burden to the Commonwealth to explain the reason for strike. All right, sir, there's not an explanation necessary as far as Mary Carter Hughes, is that agreed? She has shown a -- through her voir dire, while she was not subject to excuse for cause, she showed a long family relationship with the accused and I think either side can strike for that without impuning [sic] the motives. All right, go ahead, sir, as far as Welford Courtney.

Mr. Sanner: Your Honor, the Court will recall that Mr. Courtney indicated in his responses that he was a personal friend of James Gordon Hughes, who was Mrs. Hughes' nephew. Mr. Hughes has, I believe, either two or three cocaine distribution charges pending in the General District Court of Orange County, which in the Commonwealth's view, hope will be certified to this Court. We don't know what information Mr. Courtney may have received from Mr. Hughes regarding those matters. The Court will also recall that Mr. Hughes was the subject of a direct indictment arising out of the very same investigation, which Special Agent W.H. Taylor was

the main person involved in, and that there was some question about identification and that -- which led to the indictment being dismissed upon Commonwealth's motion. We submit that if Mr. Courtney had any information regarding this, that may affect his judgment in this case, and it was for that basis that the Commonwealth felt there was -- Mr. Courtney posed more of a risk than most of the other jurors who were left. And as far as the Commonwealth was concerned, to-- in weighing this evidence fairly, and he was struck on that basis, and not because he happened to be black.

The Court: All right, Mr. Heilberg, you want to be heard?

Mr. Heilberg: Just briefly, Your Honor. Certainly Mr. Sanner's proffer as an officer of the Court is acceptable on face value. I would just suggest, and I think the Court will probably rule based on his proffer that the record be supplemented-- could be supplemented later on even by documents in court files that support his statement. There certainly are some court documents that would support his position or something that can back that up, and that would probably be a proper way to proceed, and I anticipate that if all that is correct, that certainly an objection can-

- the objection I've raised may properly be withdrawn.

The Court: All right, sir, well, you don't have to withdraw your objection. What the Court has to do is rule now. The reason we do this when the jury is still here is so we can possibly save the panel if the Court finds there is an impermissible strike and the Court rules that it finds no impermissible racial basis for striking Welford Courtney. The Court also rules that it will accept the Commonwealth's proffer. The Court takes judicial notice of its own Circuit Court records-- I'm not taking notice of any records in the-- of what may be coming up or about to come up, but as far as the motion to nolle pros or dismiss, I don't have an independent recollection. The charge against Mr. Hughes, the Court has recollection of that, having been done in this Court by this Judge. Beyond that, why, we'll accept the Commonwealth's proffer that there are pending charges against Mr. Hughes. And that is certainly basis for exercise of peremptory strike. It's got to be remembered, and I'm sure it is remembered by counsel, that there's a great deal more leeway in peremptory strikes that the basis for strikes for cause, but we find no permissible motive.

Transcript pp. 108-113.